11-4-2022

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The Eleventh Circuit's recent decision in *Lambert v. Signature Healthcare LLC.* (11th Cir. July 8, 2022), pushes the limit in upholding arbitration clauses in contracts.[1] In June 2012, Claire Lambert was 57 years old and was unemployed for approximately six months before accepting a position at Signature Healthcare, LLC ("Signature").[2] As a condition of her employment with Signature, Lambert signed an arbitration agreement that covered claims relating to recruitment, employment, or termination of employment.[3] Lambert also signed an acknowledgment that she had received Signature's employee handbook.[4] The handbook acknowledgment stated that Signature may unilaterally change or discontinue any policy in the stakeholder's handbook.[5]

Signature fired Lambert, and Lambert sued in Florida state court.[6] Signature removed the case to federal court on federal question jurisdiction. Signature moved to dismiss and compel arbitration under the Federal Arbitration Act ("FAA"), arguing that the Arbitration Agreement was valid and covered Lambert's claims.[7]

The district court determined that the arbitration agreement was procedurally unconscionable because it was a "contract of adhesion." The district court reasoned that the

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[1] See *Have a Seat in CA,* SULLIVAN GROUP HR, https://www.sullivangrouphr.com/have-a-seat-in-ca/ [https://perma.cc/UR4J-UR52] (in section titled, "Arbitration is Alive and Well, article explains the courts approach in *Lambert*).

[2] Lambert v. Signature Healthcare LLC., No. 19–11900, 2022 U.S. App. LEXIS 18787, *1, 2 (11th Cir. July 8, 2022).

[3] *Id.* at 3.

[4] *Id.*

[5] *Id.* at 5.

[6] *Id.* at 6.

[7] *Id.* at 7.

arbitration agreement was a condition of employment and was presented on a "take it or leave it" basis. Additionally, given Lambert's financial situation, she "did not have a meaningful option" to refuse to sign it. Second, the arbitration agreement was substantively unconscionable since the handbook acknowledgment's language allowed Signature to unilaterally change or discontinue any policy.[8]

The Eleventh Circuit reversed, saying that to establish unconscionability, the party must establish that the arbitration agreement is both procedurally and substantively unconscionable. Florida courts apply a balancing or sliding scale approach, which requires that both aspects be evaluated interdependently rather than as independent elements.[9]

Under the sliding scale approach, "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable and vice versa."[10] Procedural and substantive unconscionability do not need to be present in any particular degree; rather, a relatively large quantum of one type of unconscionability can offset a relatively small quantum of the other.[11] Under the sliding scale approach, the court can determine unconscionability if the overall weight of the facts and circumstances favors intervention.[12]

The sliding scale approach has resulted in a more relaxed application of the unconscionability doctrine in each prong of the analysis and the ultimate finding of

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[8] Lambert v. Signature Healthcare LLC., No. 19–11900, 2022 U.S. App. LEXIS 18787, *1, 9–10 (11th Cir. July 8, 2022).

[9] See *Lambert* at 11 quoting *Basulto* at 1161.

[10] *Basulto* at 1159.

[11] Melissa T Lonegrass, *Finding Room for Fairness and Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOYOLA UNIV. CHIC. L. J. 1, 12 (2010).

[12] *Id.*

unconscionability.[13] For example, courts have been willing to make an overall finding of unconscionability when the *only* evidence of procedural unconscionability is the mere existence of an adhesion contract.[14]

Here, the court determined that Lambert had not shown enough to prove procedural unconscionability. A contract presented on a "take it or leave it basis" and a lack of alternative employment is not dispositive of procedural unconscionability. The court concluded that because Lambert's procedural unconscionability challenge failed, they did not need to consider whether the arbitration agreement was substantively unconscionable.[15]

The court's misapplication of the sliding scale approach is cause for concern. The court mentioned Florida's sliding scale and acknowledged that significant factors of procedural unconscionability were present, yet it never looked at the degree of substantive unconscionability.[16] The idea of the balancing test is not to find procedural or substantive unconscionability independently. Rather, we look at the totality of the circumstances to determine whether elements of unconscionability exist within either the procedural or substantive categories, and balance the weight of each element. It is logically flawed to apply a balancing test and not balance anything.

Additionally, the court's reliance on *Basulto v. Hialeah Auto* as precedent for not having to look at substantive unconscionability was misplaced. While *Basulto* does say, "because the arbitration provisions, in this case, suffered from no procedural malady, we do not reach the question of substantive unconscionability," the court was quoting a decision of a court that does

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[13] Lonegrass, *Supra* note 13, at 13.

[14] *Id.*

[15] *Lambert* at 21quoting *Basulto at* 1159

[16] The court quoted Powertel, Inc., v. Bexley, 743 So. 2d 570, 574 (Fla. Dist. Ct. App. 1999) ""Although not dispositive of [the procedural unconscionability analysis], it is significant that the arbitration clause is an adhesion contract."

not use the sliding scale.[17] The court's point in quoting that language was to distinguish how the sliding scale works from how independent analysis works before adopting the balancing approach.[18]

The Eleventh Circuit has a history of displaying confusion on Florida's unconscionability doctrine.[19] However, in this opinion, they state that they are following the balancing approach outlined in *Basulto.*[20] The court's misapplication of the sliding scale makes one question if the case was about contracts and the unconscionability doctrine. Florida law has long favored arbitration, [21] and the court may have been willing to push the boundaries to uphold the arbitration agreement.

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[17] See *Basulto* at 1159. ("Other Florida courts, reject the balancing, or sliding scale, approach and assess procedural and substantive elements independently, concluding the analysis if either element is lacking. See, e.g., Nat'l Fin. Servs., LLC v. Mahan, 19 So.3d 1134, 1136 (Fla. 3d DCA 2009) ("Because the arbitration provisions in this case suffered from no procedural malady, we do not reach the question of substantive unconscionability.").

[18] *Basulto* at 1159.

[19] Pendergast v. Sprint Nextel Corp., 592 F.3d 1119, 1133–34 (11th Cir. 2010), (the Eleventh Circuit certified the question for the Supreme court of Florida as to which approach Florida takes. The Supreme court refused to answer the question then. However, subsequently in *Basulto* Florida adopted the balancing approach.).

[20] *Lambert* at 4.

[21] *See* Michael Cavendish, *The Concept of Arbitrability Under the Florida Arbitration Code,* FLORIDA BAR J. (Nov. 2008), https://www.floridabar.org/the-florida-bar-journal/the-concept-of-arbitrability-under-the-florida-arbitration-code/ [https://perma.cc/KJC8-EL6L].